## Supme Court of the Hawaiian Islands.

SPECIAL TERM, 17TH JUNE, 1890.

THE KING VS. WANSEY.

Exceptions from Judd, C. J., sitting in Chambers.

M'CULLY, BICKERTON, AND DOLE, JJ.

(JUDD, C. J., DISSENTING.)

The defendant was charged with malicious injury in wounding a dog, the property of another, while trying to drive him from his premises, where the dog was trespassing and committing depredations.

Held, that the defendant was not acting without justification or excuse, and that the charge was not sustained.

OPINION OF THE COURT BY DOLE, J.

The question in this case is whether or not the acts of the defendant complained of constituted malicious injury.

The essential facts are stated by the Chief Justice sitting in Chambers in the decision appealed from as follows:

"On the 24th February last, the attention of the defendant was called to a dog which was running away with a piece of meat in his mouth from the kitchen on the premises where defendant was living, on School street in Honolulu. Defendant ran to where the dog was and threw a stone at it which hit it, then opened a gate near by, but the dog not making his escape, defendant threw another stone which also hit the dog. The dog was then taken away by a native woman, who was attracted to the spot by its cries. The dog is a Gordon Setter pup, about five months old of good breeding and worth from $25 to $50, the property of one George Cavanagh. The injuries to the dog occasioned by the stones thrown by defendant were the breaking of one of its fore legs in two places, and the knocking out, breaking and displacing some of its teeth, mainly the milk teeth, which are supplanted in the course of nature by permanent teeth."

"Defendant did not know who the dog's owner was."

"The defendant is charged under Chapter 23 of the Penal Code with a malicious injury and mischief, by which is made punishable "any injury or offense maliciously done or caused by any one to the property, right or liberty of another, whereby another may or might be subject to loss, damage or prejudice, or disturbance in any of his rights, liberties or privileges of person or property."

The Chief Justice found the defendant guilty of malicious injury, confirming the judgment of the Police Court where the cause was first tried.

The defendant excepted upon the following grounds:

1st. No offense had been proven. 2nd. That no malice had been shown. 3rd. That it was necessary for the prosecution to prove, beyond reasonable doubt, that defendant had malice toward the owner of the property injured. 4th. That under Section 9 of Chapter XXIII. of the Penal Code, defendant had a right to attack the dog under the circumstances shown.

Upon the third point by defendant's counsel, we agree with the conclusion of the decision appealed from, to the effect that it is not necessary to show special malice against the owner of the property, but that it is sufficient if there is no adequate legal justification and "a reckless disregard for the property of another," who is not necessarily known to the defendant.

It is not clear to us that the circumstances bring the cause within the section of the law referred to by defendant's fourth ground of exception.

The defendant's first and second grounds of exception, however, raise the question of malice which is necessary to the offense of malicious injury.

Our statutes have not greatly modified the common law relating to this offense. While malice toward the animal injured does not constitute malicious injury, yet by the common law it was sufficent if an uaimal was injured in a spirit of wanton cruelty—(4 B 1, Com. 244); and by our law the killing, mutilating, maiming or wounding an animal without adequate legal justification, and with a reckless disregard for the property of another, constitutes the offense.

Upon the question of adequate legal justification under the facts shown, we are compelled to differ from the decision appealed from. The dog was a trespasser, not only upon the grounds, but in the dwelling house of the defendant, and he was in the act of carrying off a piece of beef from the kitchen at the time the defendant attacked him, although he saw only that the dog was carrying away something in his mouth, but didn't know what it was. These circumstances afforded an adequate legal justification for the defendant's attack upon the dog which resulted in the injuries shown in the evidence; adequate to the extent of accounting for the attack without any necessity of explaining it upon the theory of malice, or a reckless disregard for the property of another.

Our opinion as to the absense of malice in the defendant is somewhat strengthened by the application of the 4th section of our statute of malicious injuries to the circumstances. This section reads, "An act done in the fair exercise, assertion, maintenance or vindication in good faith of a supposed legal right, while there is any real or apparent ground for supposing such right to exist, and the same is not used as a mere cloak, pretence or occasion for a malicious injury, shall not be punishable as a malicious injury." Does not this describe, almost literally, the status of the defendant at the moment the attack upon the dog was made?

These views are in accord with decisions elsewhere, so far as we have been able to consult the reports of causes.

"In a North Carolina case for stabbing a mare belonging to another, the jury found that the 'defendant took the mare from his cornfield where she was damaging his growing corn, to a secret part of the county, where he inflicted the wound with the view to prevent a repetition of the injury.' And the Court held that this finding would not sustain a conviction. Said the Judge (Tailor, C. J.): 'We do not think the facts found in this case bring the offense within the common law notion of malicious mischief. That seems to be confined to those cases where the act is done in a spirit of wanton malignity without provocation or excuse, and under circumstances which bespeak a mind prompt and disposed to the commission of mischief.'" (State vs. Landreth, 2 Car. L. R. 446 & 2 Bishop's Criminal Law, S. 964.) And in Wright vs. State, 30 Ga. 325, the Court say:

"If an animal is in the habit of trespassing on a man's fields and destroying his crops, and during an act of trespass he shoots the animal, not out of any malice, but to preserve his crops, though he may not be justified civilly, he is criminally. The motive is not what the law deems malicious." (Bishop's Stat. Crimes, S. 437.)

The exceptions are allowed upon the first and second grounds, and the defendant discharged.

August 22, 1890.

Deputy Attorney-General C. Creighton for the Crown; W. A. Whiting for defendant.

I respectfully dissent

A. F. JUDD.

## Supreme Court, Hawaiian Islands.

In Banco.

SPECIAL TERM, JUNE, 1890.

HILO SUGAR COMPANY VS. JONATHAN TUCKER, Deputy Tax Collector.

JURY WAIVED.

JUDD, C. J., M'CULLY, BICKERTON, AND DOLE, J. J.

OPINION OF THE COURT BY DOLE, J.

It does not appear from the record how this cause has reached the Court in Banco, but it was argued before us under an undoubted mutual understanding of both sides.

The following agreed statement of facts and issues of law was submitted by counsel of both parties.

"The Hilo Sugar Company is lessee of various tracts of land, containing in all an area of 1283 acres under covenant to pay taxes.

The Hilo Sugar Company returned these lands for taxation by name at the same rates per acre as their fee simple lands of similar nature, viz.: Fifteen dollars ($15) per acre for cane lands and one dollar per acre for bush land. The Board of Tax Appeal raised the assessment of cane land to twenty dollars ($20) per acre. Taxes at this valuation were paid by the Hilo Sugar Co. upon all of said lands.

The Hilo Sugar Co. were further assessed upon these lands the sum of nineteen thousand one hundred and thirteen 25-100 dollars ($19,113.25) as the value of their leasehold interest in the same in addition to the amount returned by the company, and paid the the tax on same under protest. The Hilo Sugar Co. made no separate return of their leasehold interest.

The questions agreed to be submitted are:

1. Can there be legally assessed against a tenant upon his interest an amount greater than the established value of similar land held in fee simple?

2. Can assessment legally be made against a landlord's interest and a tenant's interest the sum of which would be greater than the assessable value of the same land held in fee?

3. The Hilo Sugar Company having made no separate return of their leasehold interest in the above named lands, can they maintain this suit?"

A deposition of John Scott was also filed by both counsel as evidence.

It appears from the evidence that the plaintiff having covenanted with his lessors to pay the taxes that should be payable upon the lands under the several leases, undertook to make returns of such taxes directly to defendant, the Deputy Assessor, which arrangement the Deputy Assessor fell in with, and looked to the plaintiff alone, instead of his lessors, for the assessment returns and the taxes of the lands in question.

This method was irregular, for a private agreement between lessor and lessee that the latter should pay the taxes does not affect the liability of the landlord to the Government. Such an agreement is purely a private matter between the parties to the lease, and gives the lessor a claim upon the lessee for all taxes which he is required to pay an account of the leased land. (Brown-Assessor vs. Smith, No. 726 Interm. Div.)

The defendant's position is that if we regard the first taxes paid by the plaintiff, as the taxes upon the landlord's interest in the land, as they were clearly intended to be, there is nothing to prevent a further assessment against the tenant, the plaintiff, for his interest in the same land under his lease. He should have made a return of his leasehold interest—as he actually did in the case of two of the lands for which he had not convented to pay the landlord's taxes, but not having done so, it devolved upon the assessor to assess such interest, "according to the best information within his reach." This was done, and there is no appeal from such assessment.

We have, therefore, to consider whether this Court has jurisdiction over the cause. It has been the practice of Courts to refuse to investigate complaints based upon the charge of over assessment, as appeals from such assessments to the Tax Appeal Courts, are provided by statute, except in cases of a failure to make any return within the time required by the statute.

But the plaintiff claims that inasmuch as the taxes already paid upon the land are assessed upon its full value, as if no lease existed, which appears to be admitted by the defendant, there is no value remaining which may be assessed as the tenant's interest, and that the assessment, being therefore made upon an erroneous principle, is illegal.

It is doubtless a correct principle of law, that the reversion and the leasehold interests of real estate held under lease are together worth only the unincumbered value of the land. There may be in certain circumstances' exceptions to this rule, but it must be generally regarded as giving the true status of the mutual relations of such interests.

In the matter before us the reversion was assessed to the full value which had been fixed by the Tax Appeal Court as the assessable value of such lands in the district, which assessment the plaintiff submitted to. This consumed the whole value of the land in question and left no surplus value to be assessed on account of leasehold interests there. But the Deputy Assessor did assess such interest and for a large amount, i. e., $14.89 an acre for both cane land and bush land. As we do not know the comparative areas of the cane land and bush land, we cannot say whether this assessment was more or less than the assessment on the reversion, which was $20 an acre for cane land and one dollar an acre for bush land, but it is safe to say that the leasehold interest was assessed close up to the assessment on the reversion. This was clearly wrong and by it the Government has received nearly double the taxes it was entitled to from the land in question.

It is not for us to review the judgment of the Assessor in estimating values, but we may interfere where the assessment is illegal, and we think the one submitted to us is so for the reasons we have given, and in brief, not so much because the assessment upon the leasehold interest was excessive, as because it was made at all, after the value of the land had been fully assessed against the reversion.

The fact that the plaintiff made no returns of its leasehold interest is no bar to this suit, the assessment complained of being illegal. (Phelps vs. Thurston, 47 Conn. 485, State vs. Ross, 23 N. J. L. 521, State vs. Quaife, id. 89 and State vs. Metz 31 id. 365).

It will be seen that in the foregoing opinion we have substantially answered the questions submitted so far as they are applicable to this cause, and we need not refer to them further.

Let judgment be entered for the plaintiff for $191.13, with interest from December 14th, 1887, the date of the payment of taxes under protest.

F. M. Hatch for plaintiff; A. P. Peterson, Attorney-General, for defendant.

### Personal Mention.

One of the passengers from San Francisco on the steamship China was Mr. F. M. English. He paid Honolulu a flying visit last April, and was so fascinated with the climate and made so many friends, that he has resolved to pass the winter here, and possibly to settle permanently. Mr. English is a graduate of the University of Oxford, where he obtained classical honors and likewise took mathematical distinction in Oxford and Cambridge local examinations. For eight years he has been a successful tutor in the United States, preparing pupils for Harvard, Yale and other universities. He is prepared to receive a limited uumber of pupils, either to prepare them for college or to give them a college education without leaving Honolulu. Several of his pupils have taken distinguished honors in American universities. We hear that Mr. English is to read a paper some evening next week in aid of the Sailors' Home, to be followed by a humorous musical sketch of London Society after the manner of Corney Grain. We wish this gentleman success in his lecture and in his proposed work among us.

### Strong Insurance Companies.

The Finance Chronicle and Insurance Circular of Sept. 1890, states that the Royal Insurance Company of Liverpool has the largest reserve and capital of any English insurance company, amounting on that date to over $11,500,000. Hon. J. S. Walker is agent here for this strong and reliable company. Next highest in the list is the Liverpool, London & Globe, of which Bishop & Co. are agents, with a combined reserve and capital a trifle under $11,000,000.

## A MINISTER'S DINNER.

**His Excellency John A. Cummins Entertains Admiral Brown and Others at His Residence.**

Tuesday evening His Excellency the Hon. John A. Cummins, Minister of Foreign Affairs, gave a dinner at his residence in honor of Rear Admiral Brown of the U. S. Flagship Charleston. The grounds were most beautifully illuminated for the occasion and the verandas were festooned with flags and evergreens. The table presented a very pretty appearance. It was decorated with the choicest of flowers, in true artistic style. At either end were two large and clear blocks of ice, on which rested fern leaves and flowers, the effect being unique. The chandelier was festooned with leis of plumarias, and from the bottom hung a branch of oranges. All around the dining hall were potted ferns, palms and other plants.

In addition to the host and his guest, those invited were: His Ex. Godfrey Brown, Minister of Finance, His Ex. C. N. Spencer, Minister of Interior, His Ex. A. P. Peterson, Attorney General, His Ex. John L. Stevens, Envoy Extraordinary and Minister Plenipotentiary of the United States, Major J. H. Wodehouse, H.B.M.'s Commissioner, Mons. G. B. d'Anglade, French Commissioner, Mr. Taizo Masaki, Japanese Consul and Diplomatic Agent, Capt. Geo. C. Remey, U. S. F. S. Charleston, Capt. Joshua Bishop, U. S. S. Iroquois, Capt. G. N. A. Pollard, H. B. M. S. Acorn, Capt. Y. Shibayama, H. I. J. M.'s Tsukuba, Col. the Hon. G. W. Macfarlane, H. M.'s Chamberlain, Mr. C. Bolte and Major W. T. Seward.

The only toast was, His Majesty the King, proposed by His Ex. Mr. Cummins. Col. Macfarlane, H. M.'s Chamberlain, responded on behalf of His Majesty, who, he said, was unable to attend on account of severe indisposition. By command of His Majesty, Col. Macfarlane proposed the health of His Excellency J. A. Cummins, Minister of Foreign Affairs.

The menu cards were very handsomely gotten up, containing the menu in Hawaiian, the musical programme and the name of each guest. The menu was as follows:

Pipi o Ewa.
Buliona me ka Hua.
Kamaho Mo'a.
Manu Punua.
Pipi o Ewa me ka Papai.
Hipa Pulehu.
Hau hoonoono.
I'a Lawalu me ke kai helo.
Manu Pulehu.
Pelehu me ka Hame.
Moa Ku Ono.
Meaono me na mea hua.
Hau. Kope, Ti.

The Royal Hawaiian Band was stationed in the band stand in the grounds, and played the following programme during the dinner:

March—Hawaii Nei.....Berger.
Overture—King's Lieutenant.....Titl.
Waltz—Nita.....Williams.
Selection—The International Congress.....Sousa.
Finale—Tannhauser.....Wagner.
Overture—America.....Catlin.
Waltz—Queen Victoria's Jubilee.....Coote.
Selection—The Mikado.....Sullivan.
The Star Spangled Banner.
God Save the Queen.
Japanese Anthem.
Hawaii Ponoi.